[195] F.M.S. REPORTS

## THE RAUB AUSTRALIAN GOLD MINING CO., LTD. v. PUBLIC PROSECUTOR

**[A. Cr. J. (Thomas C.J.) March 6, 1936]**
**[Pahang Magistrate's Criminal Appeal No. 1 of 1936]**

*Mining Enactment, 1928, ss.130, 135 and r.27 — Ultra vires — Offence by company.*

On the 1st day of November, 1935, a fatal accident occurred at the Derrick shaft of the appellants' mine. An examination of the shaft revealed that provision had been made for two electric lights but that only one had been lit. The reason for the second one not being lit was that the bulbs were constantly getting fused. With one light the illumination was only moderate and the gates of the shaft could not be seen clearly.

The appellants were convicted by the Magistrate, Raub, of a breach of rule 27 under the rules made under the Mining Enactment, 1928.

On appeal it was argued that rule 27 was *ultra vires* because it was unreasonable and uncertain and also that it could not apply to a body corporate.

**Held:** that rule 27 was neither unreasonable nor uncertain and accordingly was not *ultra vires*.

**Held further:** that rule 27 applies to bodies corporate as well as to individuals.

*Public Prosecutor* v. *The Jelai Concession (Pahang) Limited,* [1931-32] F.M.S.L.R. 255 considered.

*B. J. P. Joaquim* for the appellants. Rules made under authority delegated by the legislature must be reasonable and certain: 23 *Halsbury* 393; *Kruse* v. *Johnson,* [1898] 2 Q.B. 91; *Stiles* v. *Galinski,* [1904] 1 K.B. 615; *Rex* v. *Broad,* [1915] App. Cas. 1110; *Repton School Governors* v. *Repton Rural District Council,* [1918] 2 K.B. 133. Notwithstanding that the section authorising the making of rules states that they shall have the force of law, it is still open to the Courts to canvass the validity of rules made under that section: *Minister of Health* v. *The King,* [1931] App. Cas. 494; *Pahang Consolidated Co. Ltd.* v. *State of Pahang,* [1931-32] F.M.S.L.R. 131, 390; [1933] M.L.J. 247.

Rule 27 coupled with rule 4 is unreasonable in that it creates an offence in respect of which *mens rea* is not an ingredient. The happening of the event constitutes the offence to which there is no defence. The offence is "failing to keep adequate lights burning," and if through an act of God, such as lightning striking the power house or a tree falling across and breaking the power line, the lights fail even for a short time, an offence is committed. It is because there is no defence to a breach of the rule that it is unreasonable, and for the same reason a rule was held to be unreasonable in *London Passenger Transport Board* v. *Sumner,* 154 L.T. 108. Rule 27 is also bad for uncertainty because it does not specify upon whom the duty of keeping lights burning is cast. If the rules are good still they cannot apply to a corporate body. They imply physical acts and a corporate body is incapable of physical acts: *Public Prosecutor* v. *Jelai Concession (Pahang) Limited,* [1931-32] F.M.S.L.R. 255; *The King* v. *Yong Lee Seng and Company,* 7 S.S.L.R. 31. Assuming that the rules are good and that they can apply to a body corporate then the conviction is bad because the appellants were charged under the rules and not under section 135 of the Mining Enactment, 1928; the appellants were convicted under section 135; it is a condition precedent of that section that an offence by an employee must be proved and no such offence was alleged, let alone proved.

*H. C. Willan,* Deputy Legal Adviser, for the respondent. Rule 27 is made in the interests of safeguarding human life and has received the approval of the Federal Council — see section 130(iii), Mining Enactment, 1928. Therefore that rule must receive a more benevolent construction than rules made by private corporations in their own interests: *Slattery* v. *Naylor,* (1888) 13 App. Cas. 446; *Kruse* v. *Johnson, supra.* Rule 27 is not uncertain as to where the duty lies to keep lights burning because section 16(vi) of the Enactment makes it clear that the lessee must carry on all mining operations in a safe manner and the appellants are the lessees of this mine. There is no reason why *mens rea* should be an ingredient of this offence. Section 135 provides for an employer not being liable if he can prove that he has taken all reasonable precautions and that the offence was committed without his knowledge or consent. Rule 27 applies to a body corporate as well as to an individual person — see definition of person in section 2 of the Interpretation and General Clauses Enactment, 1932, and *R.* v. *Tyler,* [1891] 2 Q.B. 588.

It is not competent for the Court to canvass the validity of rule 27. Under section 130 of the Mining Enactment, 1928, these rules have been laid before the Federal Council and have not been disallowed. Therefore they have the same force of law as if they had been contained in the Enactment: *Institute of Patent Agents* v. *Lockwood,* [1894] App. Cas. 347. That decision is still an authority and is not affected by the decision in *The Minister of Health* v. *The King, supra,* because in that case there was no Parliamentary manner of dealing with the order of the Minister of Health.

*B. J. P. Joaquim,* in reply. The section dealing with rules in the Tin and Tin-ore (Restriction) Enactment, 1931, is identical with that of the Mining Enactment, 1928, under which the rules were made. In *Pahang Consolidated Co., Ltd.* v. *State of Pahang, supra,* the question was raised whether rules made under the Tin and Tin-ore (Restriction) Enactment, 1931, could be [196] canvassed by the Courts. The trial [196] Judge, the Court of Appeal and the Privy Council all held that the rules were reasonable, and the inference is that these Courts were of the opinion that the rules could be canvassed. These decisions are binding on the Courts of this country.

*Cur. Adv. Vult.*

**Thomas C.J.:** This is an appeal by the Raub Australian Gold Mining Company Limited from a conviction by the Magistrate at Raub for an offence committed under rules 27 and 4 of the Mining Enactment, 1928. These rules appear at pp. 667, 671 of the 1934 Enactments. Rule 27 provides that —

"adequate lights shall be kept burning in all shaft stations which are being used."

Rule 4 provides that —

" any person offending against the provisions of any of these rules shall, unless any other penalty is prescribed, be liable on conviction to a fine not exceeding five hundred dollars and for a second or subsequent offence to a fine not exceeding one thousand dollars."

The offence charged was as follows:—

"That on or about 1.11.35 you did fail to keep burning adequate stationary lights at the No. 3 shaft station, Derrick shaft, an offence under rule 27 and punishable under rule 4 of the Mining Enactment, 1928."

The facts showed that a fatal accident had occurred at the 300 feet level at the Derrick shaft of the Raub Australian Gold Mine on the 1st of November, 1935. In consequence the shaft was visited by various officials. It was found that provision had been made at the third shaft for two electric lights but that only one of these had been lit. The reason for the second not being lit was that the bulbs were constantly getting fused. The second bulb had been fused for two or three months and had not been replaced. With one light the illumination was only moderate, and the gates of the shaft could not be seen clearly.

The facts were not disputed on the hearing of the appeal. Attention was, however, drawn to the evidence of Mr. Pascoe, a European underground mining foreman, who said that on the 1st of November, 1935, when he visited No. 3 shaft station that there was only one light burning at 1 p.m. in the further lamp-holder of the two. It was a lamp of about 40 candle power. In his opinion the lamp provided enough light, and also that at 1 p.m. the light was adequate. The learned Magistrate accepted the evidence for the prosecution that the lighting was inadequate.

On the appeal it was objected that the rules do not apply to a body corporation, that they are *ultra vires,* and that no charge had been made under section 135 of the Enactment. Now, rule 4 says 'any person offending', etc. There is no definition of the word 'person' either in the Enactment or in the rules. In the Interpretation and General Clauses Enactment, 1932 'person' is stated —

"to include any company or association or body of individuals whether incorporated or not."

This meaning will stand good unless there is something in the subject or context inconsistent with such construction or unless it is otherwise expressly provided. At one time there were doubts as to whether a company could be convicted. That time has long since passed. Of course a term of imprisonment cannot be imposed, but a fine can, and that is the punishment imposed for the breach of these rules.

In *Halsbury* Vol. 8 (Hailsham edition) at p. 112 I find the following:—

"And whereas a duty is imposed by statute in such a way that a breach of duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a corporation may be indicted, whether the statute refers in terms to corporations or not. This is so whether the breach of duty is a non-feasance or misfeasance."

See also *The Queen* v. *Tyler and another,* (1891) 2 Q.B. 588, 592.

Before I pass from this question I will refer to the case of *Public Prosecutor* v. *The Jelai Concession (Pahang) Limited,* (1931-32) F.M.S.L.R. 255, which was cited in support of a contention that a corporation could not be convicted. I do not consider that that case goes as far as that. Thorne J. in his judgment said:—

"I hold, therefore, that the section of the Enactment refers only to a natural person, and that proceedings can only be had against those who are actually found on the land committing the act which is alleged against them."

In the present case I am not prepared to say that rule 27 is only intended to apply to a natural person. Such a finding would be foreign to the Enactment and the rules made to give effect to the provisions of the Enactment.

The learned Magistrate in his judgment has said:—

"I hold the defendant company, as employers, responsible for not taking all reasonable means (section 135, Mining Enactment, 1928) to prevent such inadequacy of lighting."

[197] Section 135 is as follows:— [197]

"Whenever it is proved to the satisfaction of any Court having jurisdiction that a breach of any of the provisions of this Enactment, or of any rules made thereunder, has been committed by any person employed on the land in respect of which such breach has been committed, the employer shall be held to be liable for such breach, and to the penalty provided therefor, unless he shall prove to the satisfaction of such Court that the same was committed without his knowledge or consent and that he had taken all reasonable means to prevent the same and to enforce the observance of such provisions, provided that nothing contained in this section shall be deemed to exempt such first mentioned person from liability in respect of any penalty provided by this Enactment for any breach proved to have been committed by him."

The effect of that section is to remove liability from an employer for breaches by an employee made without his knowledge or consent, provided that the employer has taken all reasonable means to prevent such breaches and to enforce the observance of such provisions. No such position has arisen in the present case. It is in no way a question of breaches by an employee but of breaches by the appellant company.

It has been contended that the appellant company was not charged under section 135. There is nothing to suggest that there was a charge under section 135, and in my view a charge under section 135 would not have been correct, and moreover, there could not at any time be a charge under section 135, since that section only affords a defence or excuse to an employer. Therefore this ground of the learned Magistrate's decision, so far as it is based on this section, is not correct. This incorrectness does not, however, necessarily extend to the finding itself.

The question as to whether the rules are *ultra vires* remains to be dealt with. Now, the rules have been made under section 130 of the Mining Enactment. This section further provides as follows:—

"(*ii*) All rules made under this section shall be published in the *Gazette* and shall therefore have the force of law.

(*iii*) All such rules shall be laid before the Federal Council at the first meeting after such publication and may be amended or disallowed by resolution of the said Council."

Sub-sction (iii) has since been repealed, but was in force at the time when rules were approved. The rules when made and published in the *Gazette* become law unless objected to. They therefore have statutory authority [see *Dale's* case, (1881) 6 Q.B.D. 376].

It has been contended that the validity of rules which have so become law may be canvassed. The case of *King* v. *Broad,* [1915] App. Cas. 1110 has been cited in support of this contention. In reading that case I cannot find it stated anywhere that the by-laws

in question had obtained statutory authority. There is of course a distinction between rules or by-laws which have been made under a statute and those which have statutory authority. In the case of *Slattery* v. *Naylor*, 13 App. Cas. 446, this very question was raised. Lord Hobhouse in his judgment said :—

"We are dealing with the proceedings of a local authority in a colony, where the extent of area is large and population grows fast. The Act of 1867 provides methods for the more effectual establishment of local institutions. It creates a representative council, elected annually by the constituency and gives to it jurisdiction over the large range of affairs enumerated in section 153 and some other sections. By section 158 it is enacted that all by-laws 'consistent with the provisions of this Act, and not repugnant to any other Act or law in force in the Colony of New South Wales, shall have the force of law when confirmed by the Governor, and published in the Government *Gazette*, but not sooner or otherwise.' And provision is made for laying copies of such by-laws before both Houses of Parliament.

It is certainly not clear that Courts of Law are not precluded by section 158 from enquiry wether or no a by-law is reasonable."

Lord Hobhouse continued:—

"Let it be assumed notwithstanding section 158 of the Act, that such a jurisdiction exists."

It was then considered whether the by-law in question was reasonable.

"If it were possible to conceive that a council such as that of Petersham could frame, and that the Governor of New South Wales could confirm and publish a merely fantastic and capricious by-law, such as reasonable men could not make in good faith . . . . . ",

Therefore I will proceed to consider the contention that this rule 27 was unreasonable and also whether it is uncertain.

[198] [198] It has been objected that there is no provision for notice being given to the appellant company. The case of *Stiles* v. *Galinski*, [1904] 1 K.B. 615, has been cited in support of this contention. But there the by-law was considered to be invalid because it included, or might include, within its scope a class of persons who are neither legally nor morally responsible for the due observance of the by-laws, and makes those persons liable to penalties without proper safeguards as to notice. In the present case the liability was not imposed casually or conditionally, but existed from the time of the making of the rule, and therefore no notice was necessary, and no provision for notice would be requisite. In the case of the *Repton School Governors* v. *Repton Rural District Council*, [1918] 2 K.B. 133, it was held that a by-law was unreasonable because compliance with it under the circumstance in question was impossible.

So, far from compliance with rule 27 being impossible, provisions had been made in this case for lighting, which might have been adequate had they been carried out, but for seevral months the lighting which the appellant company had presumably considered necessary had not been carried out.

In the case of *The London Passenger Transport Board* v. *Sumner*, 154 L.T. 108, a by-law making it an offence not to pay a tram fare even though not demanded was held by the Chief Magistrate to be repugnant to law and unreasonable and therefore bad. His decision was upheld on appeal.

There can hardly be any similarity between the temporary passengers of a street car, and the miners or lessees of a mine who have ample time to consider and observe the rules passed for the safety of those working in the mine.

In the case of *Saunders* v. *South Eastern Railway Co.*, 5 Q.B.D. 456 a by-law was considered unreasonable because the penalty imposed varied according to the stage of the journey at which the passenger might be asked to show his ticket. There can be no such objection to rule 27.

It has been further contended that the rule is uncertain because it does not specify what lighting is necessary, but only states that the lighting shall be adequate. The expression 'adequate' has been frequently used in Acts in England, and may be assumed to be well understood. The rule applies not to persons of little understanding, but to persons engaged in an important undertaking, the nature of which requires a high degree of intelligence. It is not a question as to what would or would not be adequate, but it is suggested that the use of the word 'adequate' is so uncertain as to make the rule bad and so void.

I have not been able to find any direct authority as to the validity or otherwise of a by-law or rule requiring that adequate provision should be made in some respect or other. It may be that it has never occurred to anyone to question the validity of a by-law containing such language. In the case of *Knowles* v. *Dickinson*, 2 E. & E. 705; 121 E.R. 265, a by-law required that "adequate ventilation should be kept up in a colliery." The report states that Manisty appeared for the appellant. It is extremely unlikely that so eminent a lawyer would have omitted to take any point which could be urged in favour of his client. Yet he did not question the validity of the by-law on this ground.

I am of the opinion that such an expression is in constant employment in by-laws and rules relating to the efficient conduct of great commercial undertakings, and is well understood by those responsible for such undertakings. I am, theerfore, unable to find that rule 27 was uncertain on this ground.

It has been further contended that this rule is uncertain because it does not state the person who is to be held responsible. Now, rule 27 is one of a series of rules headed "Rules referring to underground working." The rule itself relates to the safety of persons working in underground workings. Under the heading 'General' rule 6(iii) provides that—

"any such manager so appointed under preceding rule shall, as well as the occupier, be held responsible for the safety of all persons employed on the mine."

'Occupier' is defined as "including every person registered by the Collector as the lessee or sub-lessee of mining land under the Enactment....." and section 6 sets out the persons to whom State land may be leased, and the appellant company comes within section 6(b) or (c). I am satisfied, therefore, that there is no uncertainty as to the person or persons to be held responsible.

Since in my opinion rule 27 was not unreasonable and was not uncertain, it is unnecessary for me to deal with the question of whether having statutory force it

can be considered at all. In this matter I follow the example of Lord Hobhouse in the case of *Slattery* v. *Naylor, supra,* to which I have already referred. Therefore, on all these grounds I consider that the decision of the learned Magistrate should be upheld, and that this appeal should be dismissed.

*Appeal dismissed.*

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[199] **VALLIPURAM SIVAGURU v. PALANIAPPA CHETTY**

[O. C. J. (Aitken J.) May 30, 1936]
[Negri Sembilan Civil Suit No. 2 of 1936]

*The Land Code (Cap. 138), ss.85 and 134 — Unregistered transfer — Contractual rights.*

In 1931 *G.* deposited his issue document of title to land with the first defendant as security for a loan and in 1932 sold the same land to *N.* explaining the absence of the issue document of title by a false statement that it was lost. On account of the absence of the issue document of title *N.* could not obtain registration of the transfer on sale and in consequence lodged a caveat against the land. *G.* died in 1932, shortly after executing the transfer in favour of *N.*, and in 1933 the first defendant also lodged a caveat claiming a lien by deposit with him of the issue document of title. At the end of 1933, *N.* executed a transfer of his land in favour of the plaintiff and *N.* died in June, 1934. In August, 1934, this land was transmitted to the second defendant as administrator of *G.'s* estate.

In an action by the plaintiff claiming to be registered as proprietor of this land —

**Held:** that section 85 of the Land Code (Cap. 138) prevented registration of the memoranda of transfer from *G.* to *N.* and from *N.* to the plaintiff.

**Held further:** that *N.* could not have obtained a decree for specific performance against *G.* so long as the issue document of title remained deposited with the first defendant and therefore the plaintiff could not obtain a decree directing the second defendant to transfer the land to him unencumbered by the lien.

*E. Jeff* for the plaintiff.

*W. G. W. Hastings* for the first defendant.

Second defendant absent.

*Cur. Adv. Vult.*

**Aitken J.:** There is no dispute about the facts of this case, which arises out of the somewhat disingenuous conduct of one Gan Inn, since deceased, in relation to a plot of land in the Mukim of Ayer Kuning known as Lot No. 297 and held under Negri Sembilan Grant No. 11347. In January, 1931, he deposited the issue document of title to this land with Palaniappa Chettiar, the first defendant, as security for a loan of $1,130 with interest thereon due under a promissory note dated the 19th of January, 1931, and then he sold and purported to transfer the same plot of land to one Nagappar Eliathamby, through whom the plaintiff claims, on the 17th of March, 1932, apparently explaining the absence of the issue document of title by a false statement to the effect that it was lost. Nagappar Eliathamby could not obtain registration of the memorandum of transfer because neither he nor Gan Inn could produce the issue document of title, and there is no sufficient evidence to prove that he ever presented the same for registration to the Registrar of Titles for Negri Sembilan. He did, however, on the 21st of March, 1932, lodge a caveat in the prescribed form against any transfer, charge or lease by Gan Inn with the Registrar of Titles for Negri Sembilan who duly registered the same; and in this caveat, which is dated the 19th of March, 1932, the registrable interest in the land which he was then claiming is stated as follows:—

> "An interest by virtue of a lien created in my favour by an instrument of transfer executed on the 17th day of March, 1932 by the owner thereof, for consideration paid to him in the land held under Grant No. 11347, Lot No. 297 Ayer Kuning Mukim."

The next date of importance is the 22nd of August, 1933, when Palaniappa Chettiar, the first defendant, lodged a caveat in the prescribed form against any transfer, charge or lease by Gan Inn with the Registrar of Titles for Negri Sembilan who proceeded to register the same, being apparently unaware that Gan Inn was dead. In that caveat, which is dated the 21st of August, 1933, the registrable interest in the land which the first defendant was then claiming is stated as follows:—

> "A lien by the virtue of the deposit with me by the owner of his title as security for the payment of a sum of $1,130 and interest thereon at 24 per cent. per annum due on a promissory note dated 19th January, 1931, in the land held under Grant No. 11347 for Lot No. 297."

There can be no doubt that, in view of the provisions of section 155 of the Land Code, the Registrar of Titles for Negri Sembilan acted in contravention of the law when he registered this caveat, and I am afraid that his error in that respect may give rise to considerable difficulties in the future which do not concern me now.

I see no good reason to suppose that Nagappar Eliathamby ever became aware of this caveat lodged by the first defendant, but he must be presumed to have known that he could not become the registered proprietor of this lot of land unless he could either "find" the original issue document of title or obtain a certified copy of it under section 100 of the Land Code. We do not know whether he took any steps in either direction, but we do know that on the 8th of December, 1933, he sold and purported to transfer the land to the plaintiff, who admittedly acted *bona fide* in the matter, on the footing that the original issue document of title was lost and that the plaintiff had his authority to make any application that might be necessary to enable him to become the registered proprietor. About six months later, on the 15th of June, 1934, Nagappar Eliathamby died; and on the 14th of August, 1934, this lot [200] of land was [200] transmitted to the second defendant in his dual capacity of official administrator and personal representative of the late Gan Inn deceased. There was no further change in the position until the 30th of December, 1935, when the first defendant commenced an action against the official administrator in his capacity of administrator of the estate of the late Gan Inn claiming payment of the amount then due in respect of capital and interest under the promissory note of the 19th of January, 1931, and praying for an order for the sale of this lot of land over which he alleged that he had created a lien. The proceedings in that action seem to have come to the notice of the plaintiff